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CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 31

EDWARD J. GUNNING, *Petitioner,*

vs.

GERTRUDE L. COOLEY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALVIN L. NEWMYER,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 672.

EDWARD J. GUNNING, *Petitioner*,

vs.

GERTRUDE L. COOLEY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

No Constitutional question is involved in this case, nor does it involve any question of general importance, nor is it a case in which the Court of Appeals of the District of Columbia has failed to give proper effect to applicable decisions of this Court.

On the contrary it is an ordinary negligence action against a physician in which the issues as to negligence were duly submitted to the jury under correct instruc-

tions given in accordance with well established principles of law repeatedly declared by this Court. The opinion of the Court of Appeals is now reported in 57 Wash. Law Reporter 82.

The specifications of alleged error all relate to the question of the sufficiency of evidence for submission to the jury. This question was not only considered by the trial Court on motion for a new trial but also by the Court of Appeals of the District of Columbia upon lengthy briefs and oral argument, and thereafter again by the Court of Appeals upon motion for a rehearing filed by petitioner supported by another brief. The motion for a rehearing was duly denied.

STATEMENT OF THE CASE.

The Chief Justice of the Court of Appeals, in the opinion rendered in this case (Record 73) recites a detailed and careful analysis of the material facts, so that it is needless to re-state them in this brief.

In several important particulars, the alleged summary of expert testimony contained in petitioner's brief, on page 9, omits material testimony in the record, and is also somewhat misleading in the following important particulars.

1. The plaintiff's expert, in stating that he had not made up his mind as to the cause of the injury, was referring to the fact that *from his examination alone*, he had not formed an opinion, but the expert opinion he expressed at the trial was based not only upon his own examination, but upon the facts shown by the other testimony, which he was asked to assume. As the trial Judge stated, (R. 30): "With respect to the last stated ground, not having formed any conclusion in his own mind as to the cause, I understand his tes-

timony to be that he has not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question, which was an opinion based entirely upon facts that he was asked to assume in that question." To the same effect, the opinion of the Chief Justice of the Court of Appeals in referring to the same matter (R. 75) states: "But in answer to a hypothetical question based upon his examination, together with the evidence submitted, on behalf of plaintiff, he gave his opinion as follows: 'Why she had to have something in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear.' " (R. 26.) Therefore, the assertion by petitioner that plaintiff's expert "with all of the knowledge that had come to him," had not made up his mind, is an incorrect assertion contrary to the record.

2. Likewise, the second assertion by petitioner that "if acid had been placed in the ears of the plaintiff sufficient to have caused the injury complained of, there would *necessarily* have followed an injury to the external canals of the ear," is contrary to the record, as the testimony shows (R. 29) that plaintiff's expert testified, "It is possible to put a dropper and by the use of a dropper to insert it into the ear until it reaches the eardrum; and if a dropper is inserted into the ear far enough, until it is about to touch the drum, and strikes the drum and none of the acid strikes the parts before you get to the drum, it would not cause any burn" (to the external canal of the ear).

3. Finally, the third contention made by petitioner, that the condition of plaintiff's ears was due to a chronic catarrhal otitis, was merely the opinion of

one of defendant's experts, contradicted not only by plaintiff's expert, but by the testimony of the defendant himself, who attributed the condition of her ears to a rare disease of the inner ear, known as Meniere's disease, although the injury in this case was to the middle and not to the inner ear (R. 55) and none of the other experts on either side attributed her condition to that cause. (R. 40.)

It therefore appears that there was conflicting testimony raising issues of fact, which it was peculiarly the province of the jury to decide. The trial Judge, who had the opportunity to see and observe the witnesses and to review the jury findings on a motion for a new trial, in a memorandum opinion (R. 5-6) duly overruled the motion after careful consideration, and the Court of Appeals upon a careful review of the record, affirmed the judgment.

ARGUMENT.

Petitioner, at page 15 of his brief, admits there was a conflict of testimony, but denies there was a substantial conflict with respect to any substantial issue, but the record discloses that there was a sharp conflict between the medical experts and also as to other substantial facts of the case, and the evidence was sufficient to convince the jury, the trial Judge, and the majority of the Court of Appeals, although one of the Judges, had he sat as a juror and a trier of the facts, might have decided the facts differently; but this does not change or alter plaintiff's right to a trial by jury.

On an application for certiorari, this Court has frequently held that the interpretation of "involved statement of facts, which are somewhat contradictory in character," is peculiarly the province of the jury, and

the jury's finding of fact will not be disturbed where the facts and circumstances are disputed.

Boehmer vs. Penna. R. R. Co., 252 U. S. 496.
Workman vs. N. Y., 179 U. S. 552.

This Court has already considered the question of the liability of a physician for malpractice, and Federal reports contain many decisions to the effect that evidence of negligence must be shown and the issue submitted to the jury.

Sweeney vs. Erving, 228 U. S. 233, 57 Law Ed. 815.
Laughlin vs. Christensen, 1 Fed. (2nd) 215.
Vergeldt vs. Hartzell, 1 Fed. (2nd) 633.

In the quotation from the case of Levy vs. Vaughn, 42 App. D. C. 146, 158, at page 10 of petitioner's brief, it omits from said quotation, the very important preceding paragraph which reads, in part, as follows: "There is no evidence in the case to show, and nobody says that he died from the ether." In the case at bar there was expert testimony that plaintiff's ear drums were "destroyed by something that was put in the ear;" in other words, the evidence lacking in the former case did exist in the pending cause.

It has never been contended by respondent that a judge acts as a mere automatom, and it is conceded that where the evidence is insufficient to support a verdict, the court has the right to set it aside; but where, as in this case, there is substantial, although somewhat conflicting, evidence that the injury to the plaintiff was the result of defendant's negligence in using an unclean and acid-tainted dropper to insert an oil in her ear, or in negligently inserting an acid in-

stead of an oil, issues of fact are clearly raised and under well-established decisions of this Court should be submitted to the jury.

Applying the test, "where reasonable men may differ in their interpretation of testimony," that the question is then one for the jury, how can it be said that reasonable men may not differ under the evidence in this case, when the record shows that the evidence offered on behalf of the plaintiff convinced twelve jurors, a trial Judge, and a majority of the Judges of an appellate Court?

The cases cited by petitioner are therefore without application, as the law is well-established by an unbroken line of authorities that where a cause depends upon the effect and weight of testimony, it should not be withdrawn from the jury where a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not.

As this Court said in the case of Hickman vs. Jones, 9 Wall. 197, 201; 19 Law Ed. 553:

> "In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The

jury should take the law as laid down by the court and give it in full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Texas and P. R. Co. vs. Gentry, 163 U. S. 353; 41 Law Ed. 350.
R. R. Co. vs. Ives, 144 U. S. 408; 36 Law Ed. 485.
Texas and P. R. Co. vs. Carlin, 189 U. S. 354; 47 Law Ed. 849.
Maraude vs. Texas & P. R. Co., 184 U. S. 173, 183; 46 Law Ed. 487.
Charter Oak Ins. Co. vs. Rodel, 95 U. S. 232; 24 Law Ed. 433.
Barney vs. Scheimer, 9 Wall 248, 19 Law Ed. 648.
New Jersey R. Co. vs. Pollard, 22 Wall 341; 22 Law Ed. 877.
Moulor vs. American Life Ins. Co., 101 U. S. 708; 25 Law Ed. 1077.
Weightman vs. Washington, 1 Black 39; 17 Law Ed. 52.
Richardson vs. Boston, 19 How. 263; 15 Law Ed. 639.
Richmond & Danville R. R. vs. Powers, 119 U. S. 43; 37 Law Ed. 642.

CONCLUSION.

It is evident from the foregoing that the reasons assigned by petitioner to entitle it to the extraordinary relief of certiorari are without merit, that the Court of Appeals of the District of Columbia in its careful and well considered opinion has followed the prin-

ciples of law clearly established by this Court, that the issues of fact were peculiarly within the province of the jury and were submitted to the jury under correct and fair instructions as to the law, and that no valid ground is presented for the allowance of the Writ of Certiorari and the petition should be denied.

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